Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-560

EUGENE VISLISEL, *Petitioner,*

v.

U. S. DEPARTMENT OF LABOR,
EMPLOYMENT STANDARDS ADMINISTRATION,
OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS;
RICHARD DEVINE, DEPUTY DIRECTOR,
WELDON J. ROUGEAU, DIRECTOR,
RAY MARSHALL, SECRETARY OF LABOR,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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EUGENE VISLISEL,

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U. S. DEPARTMENT OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS; RICHARD DEVINE, DEPUTY DIRECTOR, WELDON J. ROUGEAU, DIRECTOR; RAY MARSHALL, SECRETARY OF LABOR,

Respondents,

PETITION FOR WRIT OF CERTIORARI

COMES NOW petitioner, Eugene Vislisel, by and through his counsel, Daniel J. Sears, and for his petition for writ of certiorari states as follows:

1. The unpublished opinion of the U.S. Eighth Circuit Court of Appeals from which this appeal is taken was filed July 12, 1979, as evidenced by the attached copy (Exhibit A, Appendix).

2. The judgment appealed from was submitted July 8, 1979, and filed on July 12, 1979. Petitioner, having proceeded *pro se,* did not request a rehearing. The present petition for writ of certiorari is filed pursuant to Title 28, United States Code, Section 1254 (1), which confers jurisdiction in this Honorable Court.

3. The following questions are presented for review:

(a) Did the United States Eighth Circuit Court of Appeals err in affirming the granting of a summary judgment entered by the lower court without permit-

ting oral argument where requested by a *pro se* litigant, where material issues of fact clearly existed for litigation, and where an incomplete administrative record was presented for review?

(b) Is a handicapped individual under Section 503 of the Rehabilitation Act of 1973 entitled to affirmative action by a federal contractor and if so, does 29 U.S.C. § 793 confer a private cause of action?

4. This case involves the following statutory and regulatory provisions:

Title 29, United States Code, Section 793 (as amended).

(a) Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract, the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706 (7) of this title. The provisions shall apply to any subcontract in excess of $2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and non-personal services (including construction) for the United States. The President shall implement the provisions of this section by promulgating regulations within ninety days after Septmber 26, 1973.

(b) If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals, such individual may file a complaint

with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

(c) The requirements of this section may be waived, in whole or in part, by the President with respect to a particular contract or subcontract, in accordance with guidelines set forth in regulations which he shall prescribe, when he determines that special circumstances in the national interest so require and states in writing his reasons for such determination.

28 Code of Federal Regulations § 60-741.26

(a) Place and time of filing. Any applicant for employment with a contractor or any employee of a contractor may, personally or by an authorized reprsentative, file a written complaint with the Director alleging a violation of the Act or the regulations in this Part. Such complaint must be filed within 180 days from the date of the alleged violation, unless the time for filing is extended by the Director for good cause shown.

(b) Referral to contractor. When a complaint is filed by an employee of a contractor and the contractor has an applicable internal review procedure, the complaint shall be referred to the contractor for processing under that procedure. The complaint and all actions taken thereunder shall be kept confidential by the contractor. If there has not been a resolution of the complaint under that procedure satisfactory to the complainant within 60 days of the referral, the Department of Labor or the designated agency will proceed as provided in this section.

(c) Contents of complaints. Complaints must be signed by the complainants or their authorized representatives and must contain the following information (1) Name and address (including telephone number) of the complainant, (2) name and address of the contractor or subcontractor who committed the alleged violation, (3) a description of the act or acts considered to be a violation, (4) a signed statement that the individual is handicapped or has a history of a handicap or other documentation of impairment or was regarded by the contractor as having an impairment, and (5) other pertinent information available which will assist in the investigation and resolution of the complaint, including the name of any known federal agency with which the employer has contracted.

(d) Incomplete information. Where a complaint contains incomplete information, the Director or the agency designated by the Director for investigation of the complaint shall seek the needed information from the complainant. If the information is not furnished to the agency or the Director within 60 days of the date of such request, the case may be closed.

(e) Investigations. The Department of Labor or the designated agency shall institute a prompt investigation of each complaint, and shall be responsible for developing a complete case record. A complete case record consists of the following: (1) Name and address of each person interviewed, (2) a summary of his or her statement, (3) copies or summaries of pertinent documents, (4) a narrative summary of the evidence disclosed in the investigation as it related to each charge, and (5) recommended findings and resolution.

(f) Responsibilities of agencies. Agencies shall conduct investigations of complaints in accordance with specific requests of the Director.

(g) Resolution of matters. (1) If the complaint investigation shows no violation of the Act or regulations in this Part, or if the agency or the Director decides not to initiate administrative or legal proceedings against the contractor, the complainant shall be so notified. Within 30 days, the complainant may request review by the Director of such a finding or decision. (2) Where an investigation indicates that the contractor has not complied with the requirements of the Act or this Part, efforts shall be made to secure compliance through conciliation and persuasion within a reasonable time. Before the contractor or subcontractor can be found to be in compliance, it must make a specific commitment, in writing, to take corrective action to meet the requirements of the Act and this Part. The commitment must indicate the precise action to be taken and dates for completion. The time period allowed should be no longer than the minimum period necessary to effect such changes. Upon approval of such commitment by the Director or the agency, the contractor may be considered in compliance on condition that the commitments are kept. Where the matter has been referred to an agency for investigation and resolution, the contractor and the complainant, shall be advised that the resolution is subject to review by the Director and may be disapproved if it is determined that such resolution is not sufficient to achieve compliance. (3) where the complaint investigation indicates a violation of the Act or regulations in this Part (and the complaint has not been resolved by informal means), the Director, or the

agency with the approval of the Director, shall afford the contractor an opportunity for a hearing in accordance with § 60-741.29.

5. The facts material to the present case are as follows:

On June 7, 1976, petitioner responded to an ad in a Cedar Rapids, Iowa, newspaper seeking clerical workers at Collins Radio Group. Collins Radio Group was, at the time, a federal contractor and was therefore subject to the provisions relating to handicapped individuals under Title 29, United States Code, Section 793. On his application for employment as a clerk-typist, petitioner indicated a back problem as a physical limitation. Upon being interviewed by Collins, petitioner was advised that only temporary positions for which he was qualified existed in the clerk-typist area. Petitioner indicated a need for full-time employment and was thus hired as a custodian. He commenced his duties July 7, 1976, and proceeded with light janitorial work for approximately five weeks. He was thereafter assigned to a scrub crew and was required to operate a buffing machine which aggravated his back problem. Petitioner maintained that he was initially advised that scrub work would not be a part of his duties. The employer, on the other hand, contended that a detailed job description is never provided an applicant and was not provided to Vislisel. In any event, medical and supervisory personnel of Collins concluded that Vislisel could not continue the custodial duties without serious risk of further aggravating the injury. Vislisel was terminated from the custodial job and was directed to report to the personnel office on August 27. On August 30 and 31, 1976, Vislisel interviewed for an electronic assembly operator position and a clerk-typist position. The employer contended that Vislisel was offered, but turned down, these positions. Vislisel, on the other hand, maintained that none of the jobs was ever offered to him and did not conform

to his qualifications and handicap. Evidence of the two conflicting positions was apparent in the record. On September 1, 1976, Vislisel filed a Section 503 complaint with the National Office of the Federal Contract Compliance Program of the Labor Department. On October 19, 1976, Collins Radio, for the first time, requested specific information on Vislisel's disability. On November 16, 1976, Collins received a medical report from Dr. Strathman of Cedar Rapids, Iowa, indicating that repeated bending, stooping or lifting over thirty-five pounds and standing for extended periods of time would aggravate his back problem. In the interim, on November 3, 1976, a decision was made by the EEO Officer to forego a complete investigation in an attempt at settlement by conciliation. It is significant to note that subsequent to the request for medical information, Collins provided only one job interview which concerned a position which did not conform to petitioner's disability.

On December 6, petitioner expressed dissatisfaction with the delay in finding suitable employment for him. On December 17, the EEO Officer requested that Collins contact Vislisel within ten working days to discuss plans for finding a suitable position for him. On January 3, 1977, the EEO Office received a letter from Senator John Culver communicating Vislisel's complaints concerning Collins' procedures and requesting that the investigation be completed. On January 4, an EEO Officer told Vislisel that the investigation would be conducted. On January 5, Collins advised Vislisel that they had a job opening; however, Vislisel requested that all future communications be in writing since Collins had defaulted on its earlier promise to act in ten days. The EEO Officer's report indicated that the investigation was proceeded upon on January 10 and was completed the next day.

Collins subsequently attempted to have Vislisel accept a position as shipping-control clerk. Vislisel claimed, how-

ever, that exposure to the elements on the dock and extended standing by a copying machine would aggravate his back problem. Notwithstanding, an internal memo from the Shipping Control Department indicated that Vislisel was not recommended for hiring to the position.

The EEO Officer, after a two-day investigation, ruled that Vislisel was justifiably terminated from the custodial position and that Collins had attempted to provide reasonable accommodations in offering him other positions for which he was qualified. Vislisel was not given an administrative hearing at any time.

On June 17, 1977, Vislisel received written notification of the results of the investigation. On July 12, he requested national review under Section 503 of the Rehabilitation Act of 1973, as amended. The Deputy Director of the Office of Federal Contract Compliance Programs found the regional review to be in compliance with 41 C.F.R. § 60-741.26(g), concurred in the finding of no violation and so notified Vislisel on June 8, 1978. On July 13, 1978, Vislisel sought judicial review of that decision.

In his *pro se* complaint to U. S. District Court, petitioner alleged that investigative procedures outlined in Section 60-741 of Public Law 93-113 had not been followed and that there were misstatements of fact in the administrative record. He pointed out a number of contradictions in the administrative record and alleged several erroneous conclusions. Petitioner requested a hearing and reversal of the adverse administrative decision.

In December, 1978, defendants filed a Motion for Summary Judgment contending, *inter alia*, that the complaint failed to set forth what misstatements were made, that the investigation had been conducted in compliance with federal regulations, and that no issue of material fact existed for resolution. Attached to the motion was an affidavit of the Deputy Director of the Office of Federal Contract Compliance Programs, U. S. Department of Labor,

which represented that attempts had been made by the contractor to accommodate Vislisel's medical needs and contending that Vislisel refused to accept other job positions offered by the employer. Also attached was the memorandum resulting from the national review which incorporated a statement of facts, issues, analysis and recommendations.

In response, Vislisel filed a Resistance to Motion for Summary Judgment in which he requested oral argument and outlined three pages of disputed issues of fact and additional challenges to the adequacy of the administrative record. (See "Resistance," Exhibit B. Appendix.)

On March 7, 1979, the Honorable Edward J. McManus, U. S. District Judge for the Northern District of Iowa, dismissed the action "on the merits" and awarded costs to the defendants. This action was taken without granting *pro se* plaintiff the oral argument he had requested and without a hearing. Though local Rule 16(c) of the United States District Court provided that oral argument "may be had on the written request and showing of cause," petitioner's request was ignored. Furthermore, the court in its order relied upon 5 U.S.C. § 706 in defining its standard of review as follows:

> "The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> A) arbitrary, capricious, or abuse of discretion, or otherwise not in accordance with law;
>
> D) without observance of procedure required by law;" (See "Order," Exhibit C, Appendix.)

The district court entered summary judgment against the *pro se* complainant without granting him the oral ar-

gument and/or evidentiary hearing he had requested. The court found, in part, that "[c]onciliation was attempted and broken off generally as a result of plaintiff's intransigence." (See Exhibit C, Appendix.) It further rejected plaintiff's claim that the procedures outlined in 41 C.F.R. § 60-741.28 had not been followed finding such provisions inapplicable unless noncompliance on the part of the employer had been established by the agency. Having already found attempted conciliation, this ruling ignored the provisions under 41 C.F.R. § 60-741.26(g)(2) which require that an investigative finding of contractor noncompliance must precede "compliance through conciliation." The regulations provide that "[b]efore the contractor or subcontractor can be found to be in compliance, it must make a specific commitment in writing, to take corrective action to meet the requirements of the Act and this Part." 41 C.F.R. 60-741.26(g)(2). The administrative agency's finding of attempted conciliation cannot be reconciled with a finding of compliance under the regulations. The district court, therefore, erred in ruling that the agency's conclusions were in accordance with law and with observance of procedure required by law under 5 U.S.C. §706.

The appellate court affirmed the district court's judgment and entered findings that the agency's decision was not arbitrary and that it followed applicable procedural requirements. The appellate court affirmed the district court's granting of summary judgment without a hearing citing as authority two cases in which a hearing was not requested.

Contrary to the judicial findings, material issues of fact remained as to whether a prompt investigation was instituted by the Department of Labor, whether a complete case record was developed as required by 41 C.F.R. § 60-741.26(e) and whether the employer was in compliance with the Act in view of the conflicting evidence in the record.

Petitioner had complained that he was discriminated against when Collins filled guard and custodial supervisor positions with minority persons less qualified than him. The investigation summary stated that "[t]wo applicants with lower clerical ra ıgs and typing scores were hired under the guidelines of the Respondent's affirmative action program." (See "Case Summary," Exhibit D, Appendix.) Though petitioner argued that he should be included in the company's affirmative action program as a handicapped individual, the case summary suggests that he was not and was deprived of a position by placement of two less-qualified applicants. This allegation was apparently never investigated even though the Department of Labor and 41 C.F.R. § 60-741.26 guarantee a complete investigation and case record.

Though petitioner was terminated from his job on August 27, 1976, due to his disability, Collins did not request specific medical information or an examination until October 19, 1976. Yet Collins maintained that it had made reasonable efforts to conform its employment opportunities to petitioner's physical handicap. Only one job was proffered after discovery of the extent of his handicap. The evidence in the record was conflicting as to what job opportunities were in fact offered, which ones conformed to his qualifications and disability, what duties attached to each position discussed, and how expedient and meaningful the employer's efforts were to find a position for Vislisel. Even though the Department of Labor, at one point, found Collins to be derelict in its duty to find Vislisel a position, the agency and the court found compliance with the regulations. (See Exhibit E, Appendix.)

Though the *pro se* pleadings Vislisel filed with the agency and the court were inartfully drawn, they appear to have sufficiently outlined the discrepancies in the record and infirmities in the agency's conclusions and clearly evinced petitioner's desire for a hearing and oral argument.

(See "Resistance," Exhibit B, Appendix.) Yet the defendants did not offer him an administrative hearing, the federal district court granted summary judgment without hearing or argument, and the U. S. Eighth Circuit Court of Appeals affirmed both actions.

6. The basis for federal jurisdiction in the first instance is Title 29, United States Code, Section 793; Title 5, United States Code, Section 706; and Rule 15, Federal Rules of Appellate Procedure.

7. The petition of writ of certiorari should be granted for the following reasons:

a) The lower court failed to accord petitioner's *pro se* complaint the liberal construction it deserved in determining whether summary judgment should be entered.

b) Though inartfully drawn, petitioner's complaint satisfactorily enumerated the deficiencies in the administrative process that demanded judicial review and should have precluded summary judgment for defendants. Remand to the agency was the minimum relief that should have been accorded petitioner.

c) Significant questions of law were ignored by the district and appellate courts:

i) Is the handicapped individual entitled to equal treatment under a federal contractor's affirmative action program the same as any other minority?

ii) Does 29 U.S.C. § 793 and the implementing legislation confer a private cause of action to a person aggrieved by violation of its provisions? Prior federal court decisions appear to split on this issue.

iii) Are the Department of Labor's duties under 41 C.F.R. § 60-741.26 subject to judicial enforcement?

iv) If the Department of Labor does not find a violation under 41 C.F.R. § 60-741.28(a), what is the scope of judicial review and is the Department's failure to find a violation reviewable and/or subject to equitable remedies?

v) What is the proper standard of judicial review for violations alleged under the Rehabilitation Act of 1973?

vi) How can an administrative finding of conciliation under 41 C.F.R. § 60-741.26 (g) (2) be reconciled with a judicial finding of compliance with the Act when conciliation must be preceded by an investigatory indication of noncompliance by the employer?

8. The following authorities are relied upon:
Cases:

Boxall v. Sequoia Union High School District, 464 F. Supp. 1104 (N. D. Calif. 1979).

Camp v. Pitts, 411 U.S. 138, 93 S. Ct. 1241, 36 L. Ed. 2d 196 (1973).

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971).

Cort v. Ash, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975).

Crawford v. University of North Carolina, 440 F. Supp. 1047 (M.D. N. Car. 1977).

Davis v. Southeastern Community College, 574 F. 2d 1158 (4th Cir. 1978) *rvsd.* ---- U.S. ----, 99 S. Ct. 2361 (1979).

Doe v. New York University, 442 F. Supp. 522 (S.D. N.Y. 1978).

Dolese v. United States, 541 F. 2d 853 (10th Cir. 1976).

Dredge Corporation v. Penny, 338 F. 2d 456 (9th Cir. 1964).

Duran v. City of Tampa, 451 F. Supp. 954 (M.D. Fla. 1978).

General Dynamics Corporation v. Marshall, 572 F. 2d 1211 (8th Cir. 1978).

Moon v. Roadway Express, Inc., 439 F. Supp. 1308 (N.D. Ga. 1977)

Parish v. Howard, 459 F. 2d 616 (8th Cir. 1972).

Poller v. Columbia Broadcasting System, Inc. 368 U.S. 464, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962).

Rogers v. Frito-Lay, Inc., 433 F. Supp. 200 (N.D. Tex. 1977).

United States v. Prebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962).

Whitaker v. Board of Higher Education, 461 F. Supp. 99 (E.D. N.Y. 1978).

Statutes and Regulations:

Civil Rights Act of 1964, § § 601 *et seq.;* 701 *et seq.*

41 Code of Federal Regulations, § § 60-741 *et seq.*

Federal Rules of Civil Procedure ,Rule 56.

Title 5, United States Code, Section 706.

WHEREFORE, petitioner respectfully requests this Honorable Court to issue a Writ of Certiorari in the above case

Respectfully submitted,

DANIEL L. SEARS
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1700 Broadway
Denver, Colorado 80290
Telephone: (303) 831-6068

EXHIBIT A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 79-1240

Eugene Vislisel,

Appellant,

v.

U.S. Department of Labor, Employment Standards Administration, Office of Federal Contract Compliance Program; Richard Devine, Deputy Director, Weldon J. Rougeau, Director; Ray Marshall, Secretary of Labor,

Appellees.

Appeal from the United States District Court for the Northern District of Iowa.

Submitted: July 8, 1979

Filed: July 12, 1979

Before LAY, BRIGHT, and HENLEY, Circuit Judges.

PER CURIAM.

Eugene Vislisel brings this *pro se* appeal from a summary judgment dismissing his action seeking judicial review of a decision by the Department of Labor (Department) that his employer had not discriminated against him on the basis of a handicap. We affirm.

Vislisel principally contends that the district court erred in holding that the Department's decision was not arbitrary and that the Department followed applicable procedural requirements. We reject this contention on the basis of the record and for reasons set forth in the opinion of the district court.

Vislisel also contends that the district court erred in granting the Department's motion for summary judgment without a hearing. A summary judgment may issue after a motion and responses, without a hearing. *Benson v. Matthews,* 554 F. 2d 860, 862 (8th Cir. 1977); *Anderson v. Viking Pump Division, Houdaille Industries, Inc.,* 545 F.2d 1127 (8th Cir. 1976).

Accordingly, we affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

[Not to be published.]

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF IOWA

EUGENE VISLISEL,

Plaintiff,

v.

U. S. DEPARTMENT OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, RICHARD J. DEVINE, Deputy Director, WELDON J. ROUGEAU, Director, RAY MARSHALL, Secretary of Labor,

Defendants.

CIVIL ACTION
File No. C 78-49
RESISTANCE TO MOTION FOR SUMMARY JUDGMENT

COME NOW, EUGENE VISLISEL and by way of resistance to Defendants Motion for Summary Judgment, hereby comes now the Plaintiff, Eugene Vislisel and states to the Court:

1. The Plaintiff, Eugene Vislisel, has alleged a course of action that has merit.

2. That the Plaintiff, Eugene Vislisel, is a competent person to testify at such hearing.

3. That the general issues are evidenced by the affidavit and supporting documents attached hereto and incorporated herein.

4. The Plaintiff, Eugene Vislisel, ask the court to set an order for a place, time, and date for the Plaintiffs resistance so that oral arguments can be presented for the Plaintiffs Resistance to defend Motion for Summary Judgment.

WHEREFORE, the Plaintiff, Eugene Vislisel, does ask the court to dismiss the defendants motions for Summary Judgment and the cost tax to Defendants hearing.

/s/ EUGENE VISLISEL

EUGENE VISLISEL, Plaintiff
141 - 36 Avenue SW
Cedar Rapids, Iowa 52404

CERTIFICATE OF DELIVERY

I certify that I delivered a copy of the foregoing document to which this certificate is attached to all parties or attorneys of record on the 27th day of December, 1978.

/s/ EUGENE VISLISEL

By _____
EUGENE VISLISEL

GENERAL ISSUES AS TO MATERIAL FACTS

A. DID CONTRACTOR (COLLINS RADIO – CEDAR RAPIDS DIVISION OF ROCKWELL INTERNATIONAL) VIOLATE SECTION 503 '73 REHAB ACT, AS AMENDED, BY HIRING PLAINTIFF WITHOUT MAKING REASONABLE ACCOMODATION?

1. Medical Form and application marked as Exhibit "A" completed by Plaintiff (as an application for a job) both show a back problem.
2. Plaintiff was assigned to 230 Custodian, duties as explained in Exhibit "B".
3. Job Interviewer Eileen McAnnay maintains she never discusses the specifics of a position with an applicant as stated in Exhibit "C". Therefore Eileen McAnnay hired Plaintiff with known back problems to perform job assignments as specified

in Exhibit "B" with knowledge that the Plaintiff will meet the supervisor only after going on duty.

4. After Plaintiff was hired he was sent to foreman whom then informed him of all duties of a 230 Custodian. This Procedure is explained in Exhibit marked as "D".

5. Interviewer maintains she never informed Plaintiff he would not have to do scrub work as evidenced in Exhibits "E" and "F".

6. Assignment to work duties as "scrub" vs. "area" was a management prerogative as evidenced in Exhibit "G".

7. Not all 230 Custodians have done all duties of 230 Custodians as evidenced by Exhibit "K" and "L".

8. Statement of opinion as to "work performance" by co-worker as evidence in Exhibit "M".

9. Plaintiff was terminated because of reason noted in Exhibits "H", "I" and Exhibit "J" evidences termination.

B. DID CONTRACTOR TERMINATE THE COMPLAINT FROM CUSTODIAL WORK WITHOUT MAKING REASONABLE ACCOMODATION?

1. Interview with Mr. Merriweather resulted in Mr. Merriweather becoming adamant following his question — "Is your name Gene?" When Complainant replied "The given name is Eugene" Mr. Merriweather told complainant that "if you are that formal, just get up and leave the office". Exhibit "M" verifies complainant was asked to leave the office.

2. Complaintant interview with Mr. J. E. Lyons as evidenced by Exhibit "N". The interviewee tried the 'graphic typewriter' he was told he would be

using and he could not type on this machine, Interviewee then disqualified himself from being qualified to do this job.

3. Plaintiff was interviewed by Mr. Plattenberger and Mr. Schneider as evidenced with Exhibit "O". These two gentlemen did not recommend hiring Plaintiff. Exhibit "O" also evidences a letter from Mr. Boyer whom states "Based upon Mr. Vislisel's performance during his previous employment coupled with the obvious attitudinal problems displayed during these interviews, it is practically impossible for us to provide employment within Collins work force for him." These Exhibits evidence the fact that no job was offered Plaintiff nor was there endeavor to place the complainant in job openings which were compatible with his qualifications as stated on page 5 of Exhibit "P". Exhibit "Q" evidences that the company made false statements with respect to Plaintiffs employment history and thusly created dire effects elsewhere as well.

4. Item "4" Exhibit "R" notes: "R" (for Respondent Company) says in answer to question given — "says yes *sites all job offers*". The file bears evidence to the contrary with no job offers.

C. COULD PLAINTIFF HAVE BEEN ASSIGNED TO "AREA DUTIES" within the Custodial 230 JOB AS A FORM OF ACCOMODATION?

1. Area duties in custodial work does not require symtems itemized in Exhibit "V":

   a. lifting over 35 lbs.

   b. repeated bending

c. repeated stooping

d. standing for a protracted period

2. Exhibit "V" states the plaintiff could be improved with flexion exercises or bracing – is this not in itself an accomodation to a limited degree?

3. Exhibit "M" evidences Plaintiff was efficient at his work as that of a 230 Custodian.

4. Exhibit "C" evidences that Mr. Ames, supervisor, indicated complainant had been a good worker up to that point. Up to this time Plaintiff was on scrub duties as well as some area assignments – with the emphasis being on scrub. Supervisor did tell Plaintiff he was going to remain on the "Scrub Crew".

5. The greater percentage of 230 Custodians do have full time area assignments as evidenced by Exhibit "K".

6. Exhibit "H" evidences that Plaintiff was afraid something would happen if he the Plaintiff would continue working. Exhibit "A" however reveals no fears on the part of the supervisor or the personnel department when the Plaintiff was interviewed and employed with an assignment of a 230 Custodian and with known back problems.

MISSTATEMENTS OF THE RECORD IN NOTICE OF RESULTS OF INVESTIGATION AND REVIEW

A. WERE THERE MISSTATEMENTS OF THE RECORD IN THE FINDINGS?

1. Exhibit "A" evidences that the complainant did notify the Respondent of his back problem with a showing on the medical form as is stated on Exhibit "S".

2. Exhibit "S" evidences that complainant was willing to work for pay less than that of a Custodian 230.

3. Exhibit "S" – NOTIFICATION OF RESULTS OF INVESTIGATION:

   a. Complainant made known prior to being hired he had back problems as evidenced on Exhibit "A".

   b. Accommodations referred to in (2) are not made known and there is no verifiable evidence that accommodations were made.

   c. Exhibits "O" "N" and "M" evidence no qualification of complainant for jobs described in item (3). Letter of September 1, 1976 in Exhibit "S" disputes the statement in item (3).

4. Exhibit "P":

   a. Under STATEMENT OF FACTS, page 1, it is stated "When he complained about his back after working approximately 5 weeks, contractor made an attempt to consider other employment which would not interfere with his back condition, including a typing position which was complainant's original request for employment. Complainant refused to discuss the jobs." The record furnished by the Privacy Act to Plaintiff fails to show evidence to the prior quoted statement.

5. The investigation did not indicate that all custodians performed the duties at one time or another as outlined in the job description. See Exhibit "L".

6. None of the jobs mentioned were available to Plaintiff if the Plaintiff had been interested, as is evidenced by Exhibits "O" and "M". The other remaining job was one Plaintiff was not qualified to do due to lack of training.

7. The last correspondence to complainant in the month of January 1977 by Collins. Exhibit "P"

was dated June 8, 1978, and the last page states "Since January 5, 1977, the company had been endeavoring to place the complainant in job openings which were compatible with his qualifications.

8. Mr. Vislisel has shown willingness to pursue each opportunity available to him by interviewing on each known opportunity as the record itself reveals.
9. Exhibit "U" shows under item (2) that "company physician and personal physician says he should avoid bending, stooping, lifting, etc." whereas evidenced as in Exhibit "V" the personal physician says something quite different from the above quoted meaning.

A THOROUGH INVESTIGATION AND REVIEW WAS NOT CONDUCTED:

1. Letters of 9-7-77, 9-23-77 and 9-29-77 are marked as Exhibit "X".
   a. The 9-7-77 letter makes known that Plaintiff had no way of knowing the contents of the file developed by the Regional Office.
   b. 9-23-77 letter asks for knowledge of specific disagreements but ignores letter as of July 12, 1977 marked as Exhibit "S" and which received no comment or reply.
   c. Exhibit "Y" received no comment.
   d. Exhibit "Z" received no reply by Respondent.
2. As evidenced by Exhibit "C" page 4, investigator shows partiality with respondent company. He failed to obtain *evidence* by asking Plaintiff for his *documentation* of the charges resulting from the interviews of August 30 and 31st.
3. Exhibit "AA" on January 5, 1977 promises a *complete investigation.* There is no evidence in file furnished by DOL as a result of the Privacy Act

indicating any further investigation beyond Jan 5, 1977. Page 5 of Exhibit "P" states "Since Jan 5, 1977, the company had been endeavoring to place the complainant in job openings which were compatible with his qualifications." No supporting investigative facts given however.

4. No hearing was provided for Plaintiff with Respondent Company.
5. It is stated – Page 3, 2nd paragraph of *ANALYSIS* of Memorandum For: Julia Dobbs "However, for the most part the letters of rebuttal lacked supportive evidence." All evidence in the Exhibit File provided by Plaintiff furnished as a part of RESISTANCE TO MOTION FOR SUMMARY JUDGMENT came from the file furnished by the Department of Labor resulting from a request on the basis of the Privacy Act and as supported by Exhibit "BB". The contents of the Exhibit File do provide 'supportive evidence'.

VIOLATION OF 41 CRF – 741.28:

1. Please see Exhibit "Z". This letter as of June 18, 1977 was not responded by the Department of Labor. Allegations of violation of 41 CRF 60 – 741.28 are relevant since:
   a. Exhibit "Z" alleges investigation proceedings lacking in observance of procedure as required and set forth in 41 CRF 60 – 741.26.
2. Please see Exhibits marked as "CC".
   a. Letter as of November 18, 1976 indicates investigation is at the point of 'conciliation'. This means it is past the stage of 'Probable or No Probable Cause'.
   b. Letter as of December 17, 1976, describes investigative procedures as controverted with what seems to be described in 41 CRF – 741.26.

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

EUGENE VISLISEL,
Plaintiff,
vs.
U. S. DEPARTMENT OF LABOR EMPLOYMENT STANDARDS ADMINISTRATION, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS; RICHARD DEVINE, DEPUTY DIRECTOR; WELDON J. ROUGEAU, DIRECTOR; and RAY MARSHAL, SECRETARY OF LABOR,
Defendants.

NO. C 78-49
ORDER

This matter is before the court on defendants' resisted motion for summary judgment filed December 20, 1978. Granted.

Plaintiff brought this action requesting review of the Department of Labor's decision that his employer had not discriminated against him on the basis of a handicap. This court's review is defined by 5 USC §706 which provides in relevant part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

1) compel agency action unlawfully withheld or unreasonably delayed; and

2) hold unlawful and set aside agency action, findings, and conclusions found to be –

A) arbitrary, capricious an abuse of discretion, or otherwise not in accordance with law;

D) without observance of procedure required by law;

Plaintiff seems to be complaining of discrimination under 29 USC §793 which requires that parties contracting with the federal government for procurement of personal property and nonpersonal services in excess of $2,500.00 take affirmative action to employ and advance qualified handicapped individuals.

Without going into a detailed explication of the facts of this case, it is apparent that the defendants have substantially complied with the statutory and regulatory framework of the Rehabilitation Act of 1973. The procedures outlined in 41 CFR §60-741.26 were followed and a record made. Conciliation was attempted and broken off generally as a result of plaintiff's intransigence. The employer attempted to meet its obligation under the act. The Department's finding that the employer complied is supported by overwhelming evidence and in no way was arbitrary, capricious or an abuse of discretion, or otherwise not in accordance with law.

Plaintiff claims that defendants failed to proceed in accordance with 41 CFR §60-741.28. However, once the Department found the employer in compliance, there was no reason to consider that regulation which deals only with non-compliance.

The record substantially supports the Department's findings and decision. The record, pleadings, and affidavits

show that there is no genuine issue of material fact and that defendants are entitled to judgment as a matter of law.

It is therefore
ORDERED
Dismissed.
March 7, 1979.

/s/ EDWARD J. McMANUS

Edward J. McManus, Chief Judge
UNITED STATES DISTRICT COURT

EXHIBIT D

(Exerpt from Case Summary)

In addition, the Complainant had worked as a clerk-typist in the Army from 1954 to 1956, had taught typing during the late 1950's and had been self-employed, doing his own clerical work, as a real estate agent from 1961 to 1976.

Of the nineteen (19) females hired as clerk-typists from June, 1976 to September, 1976, sixteen (16) have higher clerical ratings, better typing scores, or work experience including filing, typing and other clerk-typists skills or any combination of the above.

Two (2) applicants with lower clerical ratings and typing scores were hired under the guidelines of the Respondent's affirmative action program.

One (1) female, hired as a clerk-typist, had the following clerical ratings and typing scores:

Clerical	H	Typing
Numerical	M+	53 w.p.m. — 13 errors —
Average	H−	40 w.p.m.
Spelling	H+	

In addition, this particular person had six (6) years of continuous non-related sales experience.

B. The Respondent states that the Complainant was offered two (2) clerk positions which he refused.

The Complainant states that both positions were unsuitable.

On August 30, 1976, the Complainant was offered a position as a clerk-typist in the Publications office. This was after his termination as a custodian 230 at an hourly wage rate of approximately $4.40/hr. The Complainant refused to accept this position, because it required him to work with a machine he was unfamiliar with and which, he felt, he could not perform

adequately upon. In addition, the salary of the position, at $102.00 per week, was considerably less than that he received while working as a custodian 230.

The job description for a clerk-typist (code 1695) indicates no equipment which an ordinary clerk-typist could not operate. The position offered the Complainant was a code 1695 position.

On January 5 or 6, 1977, the Complainant was offered the position of shipping control clerk. The Complainant refused this position, because it would require him

EXHIBIT E

January 5, 1977
Honorable John C. Culver
United States Senator
721 Federal Building
Des Moines, Iowa 50309

Dear Senator Culver:

This is to acknowledge your December 28, 1976, letter regarding the complaint of Eugene Vislisel, 143 33 Avenue, S.W., Cedar Rapids, Iowa, against Collins Radio Group, Cedar Rapids, Iowa.

As indicated in our November 18, 1975 and December 21, 1975 correspondence, this office has been attempting to resolve Mr. Vislisel's complaint by means of informal conciliation, consistent with Section 503 of the Rehabilitation Act of 1973, as amended. Mr. Vislisel was in agreement with this procedure when he wrote this office on November 22 (copy attached).

On December 6, 1976, this office, via a telephone conversation, requested Collins Radio Group to make contact with Mr. Vislisel regarding the company's plan for identifying suitable employment for him. This verbal request was followed by a December 17, 1976, letter requesting that the company contact Mr. Vislisel within 10 working days and apprise this office of that contact (see enclosure).

Since Collins Radio Group has not complied with our written request, a complete investigation will be pursued.

Your office will be informed of the outcome of the investigation.

Sincerely,
DOYLE I. LOVERIDGE
Regional Administrator
OFCCP:RGM:AG
Enclosures

Supreme Court, U. S.
FILED
JAN 28 1980
MICHAEL RODAK, JR., CLERK

No. 79-560

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

EUGENE VISLISEL, PETITIONER

v.

UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR REHEARING

Eugene Vislisel
Petitioner Pro Se
141 - 36 Avenue S.W.
Cedar Rapids, Iowa 52404

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79 - 560

EUGENE VISLISEL, Petitioner Pro Se

v.

U.S. DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on January 7, 1980 and (2) granting the petition. As grounds for this motion, petitioner states the following:

1. THE GRANT OF CERTIORARI IN SACHER v. UNITED STATES, 342 U.S. 858 AND PHILLIPS PETROLEUM CO. v. WISCONSIN, 346 U.S. 934.

The above two cases represent two of the three certioraris granted by the

U.S. Supreme Court in the years 1951-1953. These two cases are not classified except as cases in which the Court changed its mind. The point on which the conflict exist in this case is similarly without classification and is based upon a paramount error in need of correction in the courts below in the interest of justice.

The case was decided in favor of the Government on grounds that I had refused job offers. Currently the Iowa Department of Job Service is investigating this charge by the Government as the respondent company did fail to report these refusals to accept job offers to Job Service of Iowa - as they were required to do. Proving these job offers and refusals would have ended in the termination of my unemployment compensation benefits prior to full term completion. These benefits never were terminated prior to expiration of full term although the opposition claims I had refused job offers during the interim.

There never was any intransigence on the part of myself as stated in the decision by the District Court Judge. Intransigence was not a statement of issue but introduced by the District Court Judge. Recently I have reapplied with the respondent company and was told my application will not be considered despite the fact that the record does show my work as good when previously employed with this company (p. 43 of the

record) and that I was terminated solely because of my handicap (p. 63 of the record). The record does show on p. 74 that the respondent company stated they attempted to employ me since January 5, 1977 but they now refuse to reconsider my application. A Summary Judgment was used to dismiss this case in District Court. Summary Judgments are not intended to be used indiscriminately where cases do have merit. A hearing requested in compliance with local rules was also denied by the District Court Judge. Never was there an administrative hearing by the reviewing agency.

2. THE VIOLATION OF THE PRINCIPLES OF COLE v. ARKANSAS, 333 U.S. 196.

As a matter of due process, I was clearly entitled to have the validity of the District Court decision appraised by the Court of Appeals "on consideration of the case and the records and as the issues were determined". COLE v. ARKANSAS, 333 U.S. 196, 202. But that principle was egregariously violated by the court below; and this error--which is of constitutional proportions--was repeated in the Government's Brief in Opposition before this Court. The affirmance below was premised on the theory that the final determinations of the reviewing agency as presented were factually correct without any regard as to the inaccuracy of representations regarding job offers. The same concept as the "denial of job offers by myself" is repeated by the Government on page 3, 4,

and 5 of the Brief For the Respondents In Opposition as used before this court.

Yet the most careful examination and analysis of the record shows not a scintilla of evidence, of any kind or description that I in fact was offered any jobs at all. But the Court of Appeals completely ignored that fatal flaw in the evidence. Rather the evidence does show (1) the Respondent Companies Doctor recommended no factory jobs for myself because of my handicap[1]-yet page 125 of the record shows the agency findings and also the court findings do clearly show that I refused a factory position and (2) Interviewer Schneider wrote a letter to Personnel recommending against hire of myself for shipping control clerk[2]--yet page 125 of of the record shows the agency determinations and also the court findings do show that I refused a position for shipping control clerk. The law in question here--SECTION 503, REHABILITATION ACT OF 1973, AS AMENDED, and its implementation by Public Law 93-112 and Part 60-741 - AFFIRMATIVE ACTION OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS FOR HANDICAPPED WORKERS, does in fact require the Federal Contractor to employ a handicapped worker for a job the handicapped worker is qualified to perform. Qualification is defined in 60-741.2 of

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1 Made a part of the record by Special Designation, p. 158 of the records.

2 Page 69 of the record

AFFIRMATIVE ACTION OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS FOR HANDICAPPED WORKERS as one who "is capable of performing a particular job, with reasonable accommodation to his or her handicap". Merely alleging a job offer without proving job qualification and job offers does not meet the test of the applicable law. Thus the lower court decisions removed the burden on the Government to produce any evidence of the federal contractor actually offering a handicapped worker jobs for which he is qualified to do.

Thereby, I was deprived of my right to have my case reviewed on the basis of the theory of SECTION 503, REHABILITATION ACT OF 1973, AS AMENDED, and charges contrived therein. Contrariwise, I have been denied any right to a court hearing as requested although made with compliance to the rules of the court. This combination of circumstances is so grossly violative of the principles of COLE v. ARKANSAS, supra, as to call for a re-evaluation of the denial of certiorari and to permit my case to be appraised on the basis of the charges actually made.

CONCLUSION

For the reasons as set forth above, as well as those contained in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the

judgment and opinion below.

Respectfully submitted,

_____

Petitioner, Pro Se

January 25, 1980

CERTIFICATE OF PRO SE PETITIONER

As pro se petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 (2).

_____

Petitioner, Pro Se

CERTIFICATE OF DELIVERY

I certify that I delivered copies of the foregoing document to which this certificate is attached to all parties or attorneys of record on the 25th day of January, 1980 as per rule 33. All parties required to be served have been served.

_____

EUGENE VISLISEL